NO. 82 - 207
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

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SUPREME COURT, U.S.

EASTSIDE MENTAL HEALTH CENTER, INC.

Petitioner

v

DAVID R. WILLIAMS,

Respondent

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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Questions Presented

1. Is a non-profit corporation under contract with the State to provide community mental health services entitled to immunity from the Fair Labor Standards Act?

2. Is such a non-profit corporation performing an "integral operation in an area of traditional governmental function?"

Parties

The Petitioner incorrectly shows that only itself and David Williams are parties. The Secretary of Labor was allowed to intervene as a party in the Court of Appeals shortly before the oral argument and should therefore be a respondent in this Court. See Order of 4 December 1981.

Table of Contents

Questions Presented 2

Parties 2

Table of Contents 3

Table of Citations 3

The Writ Should Be Denied

I. Eastside is not acting as "the State." 4

II. Eastside does not perform an "integral state operation in an area of a traditional governmental function." 9

Conclusion 10

Table of Citations

Cases:

Amersbach v City of Cleveland, 528 F2d 1033 (6th Cir 1979) 9

Hodel v Virginia Surface Mining and Reclamation Association, 452 US 264 (1981) 4

Jackson v Metropolitan Edison Co., 419 US 345 7

National League of Cities v Usery, 424 US 833 (1976) 4

Rendell-Baker v Kohn, ___US__, 50 USLW 4824 (25 June 1982) 7

Other:

Ala Code §22-51-1 et seq. 5-6

Ala Code §35-4-29 6

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The Writ Should be Denied

Before the Eastside Mental Health Center may claim an exemption from the Fair Labor Standards Act, it must satisfy three requirements:

> First, there must be a showing that the challenged statute regulates the "States as States." *** Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *** And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Hodel v Virginia Surface Mining and Reclamation Association, 452 US 264, ___, 69 LEd2d 1, 23 (1981); see also, National League of Cities v Usery, 424 US 833, 837, 841, 844 (1976). Since a ruling in favor of Eastside is required on all three before it may claim the exemption, the Circuit Court's rulings on these factors should be considered alternative holdings.

I. EASTSIDE IS NOT ACTING AS "THE STATE."

Eastside apparently wants this Court to review the decision below to overturn the Circuit Court's use of the NLRB's political subdivision test. Eastside complains about both the applicability of the test and the correctness of its application.

The purpose of the NLRB test is to determine whether a particular entity is a governmental unit. One way of determining this is to look at the orgnizational structure of the entity. The Court of Appeals found that Eastside had been organized as a non-profit corporation and was therefore not a state agency. Eastside now argues that "the mere fortuity of Eastside's incorporation under Alabama's general non-profit statute" should not make it a private employer, but that it should be treated as an "Act 310 corporation" even thought it was not established under that Act, Petition at 12. A brief survey of that Act and the actual incorporation of Eastside Mental Health Center shows how incorrect this is.

Act 310, now codified as Ala Code §22-51-1 et seq. (see Petition at 39a-49a), provides for the formation of public corporations to contract with the state Mental Health Board to perform certain mental health services. The prerequisites to incorporation under Act 310 are more detailed and onerous than those of private for-profit or not-for-profit corporations: the incorporators must seek and receive permission to incorporate from "each [public] governing body" in whose area they desire to operate. Ala Code §22-51-3. Proposed amendments to the certificate of incorporation must be approved by the same public

governing bodies and the Alabama Mental Health Board. Ala Code §22-51-7.

Eastside was not incorporated under Act 310;[1] it was incorporated under the general non-profit corporation statute by four natural persons,[2] without seeking approval of local governments. The certificate of incorporation does not state that Eastside is a subsidiary of, or controlled by, any other corporation or governmental entity.

The State of Alabama must have had a reason for requiring more prerequisites for incorporation of public corporations than for private non-profit corporations. These might have included the desire to have local governments approve of such corporations and their plans. Eastside has avoided all these safeguards by incorporating as a private non-profit corporation, but claims that it still enjoys the benefits of being a public corporation. In short, Eastside claims the privileges and immunities of a public corporation even though it has not complied with state law to become such a public entity.

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1. Eastside alleges that "the State limited the number of Act 310 corporations that could exist," Petition at 3, but such a limitation does not appear in Act 310, nor does Eastside explain where it is found.

2. One of these, Homer A. Jackson, Jr., had the words "Jefferson-Blount-St.Clair Mental Health Authority, Inc." typed beneath his signature. There is no indication of Jackson's position with, or authorization by, the Authority. The notary's certificate does not indicate that Jackson was acting for a corporation. In Alabama, the verification on a deed or certificate of incorporation must clearly state the capacity in which the person has executed the instrument. See, Forms of Acknowledgment in Ala Code §35-4-29.

The same decision (as to Eastside's status) would have been reached if the Circuit Court had applied the Fourteenth Amendment "state action" test. Rendell-Baker v Kohn, ___US__, 50 USLW 4824 (25 June 1982), provides an excellent analytical tool in this context. Ms. Rendell-Baker's employer was a non-profit, private school under contract with the Boston and Brookline school systems. Although "[t]he State ha[d] issued detailed regulations concerning matters ranging from recordkeeping to student-teacher ratios," the personnel policies of the school were not State-mandated. 50 USLW at 4826. Because the State had not required the school to discharge Ms. Rendell-Baker, this Court held that the action of the school in discharging her was not attributable to the State. The Court reaffirmed the principle that, in the absence of a "sufficiently close nexus between the State and the challenged action of the regulated entity," the regulated entity's action may not be attributed to the State. Jackson v Metropolitan Edison Co., 419 US 345, 350 (emphasis added).

In the present case, there is extensive regulation of Eastside by means of State Mental Health Board regulations, Petition at 51a-55a, and a contract with the Jefferson-Blount-St. Clair Mental Health/Mental Retardation Authority.[3] However,

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(cont.)

3. Brian McManus, Director of Eastside, testified as follows:

> Q. Is [Eastside] responsible to any other agency in terms of reporting what it does or getting permission to do things?
>
> A. It's very, very complex. We have many, many funding sources, and because we have many and varied funding sources, we have to abide by the rules of the funding agencies. All of our revenues except one are contracts for services. The Federal Government grants us money, and by

neither the Department of Mental Health nor the Jefferson Authority told Eastside how much to pay David Williams or what his working hours should be.[4] Thus the State should not be charged with responsibility for Eastside's conduct, nor should Eastside be allowed to escape liability by hiding behind the State.

The Fourteenth Amendment "state action" cases should be used to determine the existence of the first part of the Usery-Hodel test. Otherwise, there could arise the anomolous situation that an agency's personnel policies might be exempt from the FLSA because it was performing a state function and, at the same time, exempt from the Fourteenth Amendment because it was not engaged in "state action."

(cont.) virtue of that grant, we're subject to numerous rules and regulations set forth as a condition of that grant. *** The State Department of Mental Health actually contracts with a superordinate agency here in Jefferson County called the Jefferson, Blount, and Saint Clair Mental Health and Retardation Authority, who in turn subcontract with us.
McManus deposition of 16 June 1979 at 8-9.

4. Brian McManus testifed as follows:
Q. (by Eastside's attorney) All right. And are these transitional home duties and salaries and other matters governed by or based on federal and state guidelines and regulation?
A. No.
McManus deposition of 16 June 1979 at 32.

II. EASTSIDE DOES NOT PERFORM AN "INTEGRAL STATE OPERATION IN AN AREA OF A TRADITIONAL GOVERNMENTAL FUNCTION."

The opinion of the Court of Appeals makes clear that the portion of the opinion relating to "integral state operations" is dicta:

> For this reason it is not necessary for us to consider the extent of the FSLA's effect on Eastside's function of granting mental health services, nor need we decide whether such a function is traditional or essential.

Petition at 18a. Nevertheless, Eastside has devoted a large part of its Petition to complaining about the test used by the Court of Appeals and comparing it to tests utilized by the First, Fifth, and Sixth Circuits. Once again it has not argued that the use of any other test will change the result.

Under the test enunciated in Amersbach v City of Cleveland, 528 F2d 1033 (6th Cir 1979), mental health services would not be "integral" because government is not the principal provider of the service, nor is government particularly well-suited to provide such services. In fact, 81% of general hospitals providing psychiatric services are non-governmental.[5]

Eastside asserts that complying with the FLSA by paying David Williams back wages and damages will place "a substantial

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5. National Institute of Mental Health, "Emergency Services in Psychiatric Facilities, United States, January 1974," Statistical Note No. 128, (Washington : Government Printing Office, 1976).

economic burden" on the State.[6] Like the coal mine operators in Hodel, Eastside believes that a cost to the State automatically means that the federal regulation is wrong. This Court rejected that proposition in Hodel, 452 US at ___, 69 LEd2d at 26 n.33. Substantial economic effects are not proof of integral state operations.

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6. Eastside's cost figures are suspect. First, David Williams is not owed $27,000 in back wages, but $27,000 in liquidated damages and wages. Second, there is nothing in the record that shows that any other organizations use the same work schedule that Eastside does. Third, there is no support for the $700,000 figure asserted in Petition, n.11: this figure first appeared in a brief in suport of rehearing in the Court of Apeals, but nowhere is there evidence to show how it was calculated.

CONCLUSION

For the reasons set out in this brief, the Court should deny the Petition for Writ of Certiorari.

Eastside is incorrect in its argument that it should be treated like a political subdivision. The evidence shows that it was correctly characterized by the Circuit Court as a private, non-profit corporation, and that the same decision would have been reached if the Court had applied other analyses. Eastside is also incorrect in asserting that it performs an integral state function. Neither the facts nor the law support its position.

Submitted by,

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Certificate of Service

I the undersigned counsel of record hereby certify that I have mailed, postage prepaid, a copy of the Motion for Leave to Proceed In Forma Pauperis and a copy of the Brief in Opposition to each of the following:

John G. DeGooyer, Esq., Michael K. Wyatt, Esq., Hamel Parks McCabe and Saunders, 888 16th Street NW, Washington DC 20006

Frank O. Hanson Jr, Esq., Emond and Vines, 1800 City Federal Bldg, Birmingham AL 35203

Hon. Rex E. Lee, United States Solicitor General, U.S. Department of Justice, Room 5143, Tenth and Constitution Ave. NW, Washington DC 20530

Beate Bloch, Esq., Associate Solicitor of Labor, US Department of Labor, Room N-2716, 200 Constitution Avenue NW, Washington DC 20210

I further certify that all parties required to be served have been served.

Certificate of Mailing

I certify that I mailed a copy of the Brief in Opposition to Certiorari at or before 5 pm on the 7th day of September 1982, correctly addressed to the Clerk of the Supreme Court and with first class postage affixed.

Under penalty of perjury, I affirm the foregoing statement is true and correct. Executed this 7th day of September 1982.

Edward Still

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Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent David Williams asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis. No motion to proceed in forma pauperis was filed in the courts below.

The respondent's affidavit in support of this motion is attached hereto.

Submitted by

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205/322-6632
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In the Supreme Court
of the United States
NO 82-207

Eastside Mental Health Center

v

David Williams

Affidavit in Support of Motion
To Proceed in Forma Pauperis

I, David Williams, hereby depose and say that I am the appellee or respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; costs or give security therefor that I believe I am entitled to redress.

1. Are you presently employed? No State the date of your last employment and the amount of salary and wages per month which you received. I was last employed on 12 December 1981 by Gregory Salisbury Metal Products, 805 S., Front St. New Orleans, LA 70130, at $211.25 per month.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form or rent payments, interest, dividends, or other source? Yes. Describe each source of income, and state the amount received from each during the past twelve months. I have been engaged in miscellaneous carpentry work, but have not received net income from it.

3. Do your own any cash or checking or savings account? Yes. State the total value of the items owned. $1721.01.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?. Yes. Describe the property and state its approximate value. Carpentry or construction tools worth $200-300.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Under penalty of perjury, I affirm that the foregoing statementis true and correct. Executed this 12th day of June 1982.

David Williams

David Williams